Supreme Court, U. S.
JAN 24 1975

IN THE

Supreme Court of the United States

NO. 74-1635

ROBERT J. HELLER,

Petitioner,

v.

DISTRICT OF COLUMBIA COURT OF APPEALS COMMITTEE ON ADMISSIONS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported at 333 A.2d 401 and is appended to this petition at 1a. The written findings of fact and conclusions of that court's Committee on Admissions are unreported and are appended at 4a.

JURISDICTION

The judgment of the District of Columbia Court of Appeals affirming its Committee on Admissions' denial

of petitioner's application is dated and was entered February 26, 1975. Mr. Chief Justice Burger entered an order extending the time for filing a petition for writ of certiorari to June 26, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether Rule 46 I(d) of the District of Columbia Court of Appeals violates first and fifth amendment vagueness and overbreadth standards by its undefined requirement that an applicant for admission to the bar be found to have good "moral character."

2. Whether, consistently with the due process and equal protection requirements of the fifth amendment, a conclusion that a bar applicant lacks sufficient "moral character and general fitness to practice law" may be grounded on the fact that 5 years earlier the applicant had entered a plea of guilty to a felony charge which plea was not followed by a judgment of conviction.

3. Whether, in light of the vagueness of the "moral character" standard, the Committee's findings and conclusions are sufficiently definite or based on sufficient evidence to comport with the due process clause of the fifth amendment.

CONSTITUTIONAL PROVISIONS AND COURT RULE INVOLVED

Constitution:

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . . *U.S. Const., amend. V.*

Rule:

No applicant shall be certified for admission by the Committee until a careful examination has been made into the applicant's moral character and general fitness to practice law and a favorable report is rendered thereon. . . . *D.C. Ct. App. R.* 46 I(d).

STATEMENT OF THE CASE

The Proceedings

Petitioner applied for admission to the District of Columbia bar on May 3, 1972. He passed the bar examination but was advised by the respondent Committee on Admissions of the District of Columbia Court of Appeals that it was unwilling to certify him for admission. Accordingly, petitioner requested a hearing.

The Committee then notified petitioner of the matters that it considered adverse and which would frame the issues for the hearing. It had determined from his file that he lacked the requisite "moral character and general fitness" because of civil and criminal litigation in which he had been a defendant.

The Committee's findings of fact, delivered on May 3, 1974 after the hearing, were, in full:

(a) Heller knowingly pleaded guilty to the crime of receiving stolen goods.

(b) Heller does not honor commitments and obligations. As an illustration, he has pending claims against him which are unsatisfied without sufficient explanation.

These findings were made in support of generalized conclusions that petitioner had failed to carry his burden of demonstrating sufficient moral character

and fitness for admission to the bar (reproduced at p.p. 4a-5a, *infra*).

On notification that the Committee's decision would be adverse, petitioner set in motion the process for securing a determination from the District of Columbia Court of Appeals. That court rejected petitioners constitutional challenge, found that the Committee's two findings of fact were supported and concluded that the "Committee's conclusion that the application should be denied is affirmed . . . ." (3a).

The Evidence

At the hearing petitioner presented fourteen affidavits from a broad range of lawyers, clergymen, and businessmen attesting to his good character and the various ways it had manifested itself. The only live witness was petitioner himself, who testified for a full day.

Concerning the criminal proceeding that was a basis for the Committee's final decision, petitioner explained the circumstances of his guilty plea. He was charged, in January 1969, with receiving a stolen automobile. His wife had bought the car from an automobile dealer friend of theirs. The State agreed to petitioner's request that he stand trial alone to spare his wife anguish. He did not know the car was stolen and maintained his innocence but, during trial, it appeared that there would be difficulty in firmly establishing a defense. Negotiations with the judge and prosecutor opened up the entry of a guilty plea as a satisfactory disposition of the case. For this reason, and not because he believed he was guilty, he so pleaded, the case was placed "on file", and there was no further adjudication, fine, or

penalty. Under Massachusetts law this does not amount to a "conviction", so the Committee found only that petitioner had "pleaded guilty."

The Committee's second finding of fact is rather unenlightening in that it only "illustrates" its conclusory language with the cryptic reference to "pending claims," "without sufficient explanation." In presenting the matter to the Court of Appeals respondent relied on evidence of four cases either pending or having proceeded to judgment. Petitioner's testimony explained the posture of the litigation, cleared up erroneous impressions as to some of it, and affirmed his sense of obligation to satisfy any judgments (he has not been attached or garnished) while preserving his position of contesting disputed claims prior to judgment.

Raising the Federal Questions

Petitioner's Response to Order to Show Cause filed in the Court of Appeals alleges the following: "The conclusions . . . are not properly supported by valid findings of fact." ¶ 1. "The findings . . . do not constitute sufficient grounds for denial of the Application . . . ." ¶ 3. "The findings of fact and conclusions . . . are arbitrary, capricious, and not in accord with the evidence and the law." ¶ 5.

> The Applicant . . . [is] denied, the equal protection of the laws to the extent that the rules pertaining to admission of attorneys and specifically, to the evidence of good moral character and fitness are unreasonably vague. No standards have been ascertained nor promulgated, the Committee exercises its own subjective evaluation, which it is free to apply inconsistently in different cases. ¶ 6.

Appellant's (petitioner's) Brief in the Court of

Appeals argued the void for vagueness doctrine at pp. 2-6. *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957) and *Konigsberg v. State Bar*, 353 U.S. 252 (1957) are further discussed at pp. 7-8, 21-22 regarding both facial and applicatory unconstitutionality of the standard. The Brief for the Respondent (Committee) in that court begins by stating the issue thus:

> 1. Do Sections I(d) and I(e) of Rule 46 of this Court . . . deny the applicant equal protection of the laws?

The Court of Appeals said that petitioner "contends that the standard of good moral character and general fitness to practice law is unconstitutionally vague . . . ." (2a, *infra*)

REASONS FOR GRANTING THE WRIT

A. "Good moral character" as a standard for admission to the bar is unconstitutionally vague and overbroad.

The vagueness of the "good moral character" standard stands out from the Court of Appeals' own language and quotation:

> It is true that the term "good moral character" is a *term of broad dimensions and, as has often been said, can be defined in many ways. E.g. Konigsberg v. State Bar of California*, 353 U.S. 252, 262-3 (1957). But one would be hard put to enunciate a better standard for admission to the Bar. "With us too [as with England] the requisite 'moral character' has been the historic unquestioned prerequisite of fitness. * * * No doubt satisfaction of of the requirement of moral character involves *an exercise of delicate judgment* on the part of those who reach a conclusion, having heard and seen the applicant for admission, a judgment of which it may be said as it was of 'many honest and sensible judgments' in a different context that it

> expresses '*an intuition* of experience *which outruns analysis* and sums up many *unnamed and tangled impressions*,—impressions which may lie *beneath conciousness* without losing their worth.' " *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U.S. 232, 248 (1957) (Frankfurter, J., concurring). (2a-3a, *infra*) (emphasis added)

That Mr. Justice Frankfurter's language doesn't disapprove the standard doesn't alter the fact that he is describing an exceedingly vague concept; his is a concurring opinion that doesn't appear to attach the constitutional significance to vagueness that the majority does in *Konigsberg v. State Bar*, 353 U.S. 252, 263 (1967).

The Committee itself argued to The Court of Appeals:

> Concededly the conception "moral character" is one whose dimensions are not easy to precisely outline, which necessarily calls into play subjective factors and the exercise of delicate judgment. . . . Brief for Respondent at 5 (D.C. Ct. App.).

In other words, it would appear that "men of common intelligence must necessarily guess at its meaning and as to its application. . . . " *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

The American Bar Association's Commission on Correctional Facilities and Criminal Law Section have published a book subtitled "A study of state laws restricting the occupational licensing of former offenders": *J. W. Hunt et al., Laws, Licenses and the Offender's Right to Work* (1973). This study observes that a "good moral character" standard is often criticized for vagueness, and:

> In other words it sounds good but the term fails

> to define what it means. As one commentator observed, "Good moral character, the subject of philosopher inquiry through the ages, can hardly be expected to apprise an applicant of the conduct expected of him." *Id.* at 6, citing *Entrance and Disciplinary Requirements for Occupational Licenses in California*, 14 Stanford L. Rev. 533, 539 (1962).

The right to work is of great importance, involving, either directly or penumbrally, first amendment concepts. *CF. Truax v. Raich*, 239 U.S. 33, 42 (1915); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1886), *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 321-22 (1866). Accordingly, strict standards of vagueness and overbreadth should be applied.

Nowhere in the record of this case, the Rules of the District of Columbia Court of Appeals, or the case law of the jurisdiction does there appear a definition or history to give the term the "well-defined contours" that were relied on to uphold such a standard in *Law Students Civ Rts. Research Council v. Wadmond*, 401 U.S. 154, 159 (1971). Nor is there the clear content that allowed the Court to decide *Konigsberg v. State Bar*, 353 U.S. 252, 263 (1957) without holding the standard unconstitutionally vague.

The issue is of widespread importance—all 51 jurisdictions in the United States have similarly stated standards for admission to the bar, and most of them have such standards for other professions and a plethora of other occupations. *J. W. Hunt et al., Laws, Licenses, and the Offender's Right to Work* A2-A13 (1973). That study found a total of 1814 different licensing provisions with "a requirement of, or similar to, good moral character." *Id.* at 5-6.

There is of course particular interest nowadays in the character of lawyers. In the eyes of the public at least, the character and fitness determinations have been a failure.[1] Regardless of whether this impression is accurate, it illustrates that it is time, indeed past time, for the bar to tighten up its procedures. It should bolster respect for constitutional safeguards by observing them in its own affairs. It should be required to govern its own membership by the same narrowly drawn rules tailored to the precise needs of the situation as the courts require of others.

B. **The 5-year-old plea of guilty not followed by a conviction is an insufficient ground for denying admission to the bar.[2]**

In *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957) the Court moved toward examining, under a constitutional light, restrictions on entry into occupational areas. But, after upholding in 1960 such a pro-

[1] A sidelight to this case is that, through the hearing, the Chairman of the Committee on Admissions was Kenneth W. Parkinson. He left the Committee before its decision herein after his indictment on the Watergate-related charges of which he was recently acquitted. He authored a preliminary memorandum finding petitioner unfit. The language of this memorandum appears in the formal notification of adverse findings and again in the Committee's final findings and conclusions.

[2] That this was only one of two findings on which the Committee's and Court of Appeals' conclusions were based is irrelevant for present purposes because it is impossible to say with any assurance that the decision would still have been adverse without this finding. See, *e.g.*, *Stromberg v. California*, 283 U.S. 359 (1931); *Williams v. North Carolina*, 317 U.S. 287, 292 (1942); *Greenbelt Coop. Pub. Ass'n. v. Bresler*, 398 U.S. 6, 11 (1970). Besides, the pervasive vagueness of the entire scenario—rule, findings, and conclusions—whether or not a sufficient ground alone for granting certiorari and reversing (issue no. 3 herein) certainly dictates careful scrutiny of each part.

hibition in a rather limited context,[3] the decade passed without the Court reviewing a single case of civil disability resulting from criminal conviction. Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 Vand. L. Rev. 929, 1186 n. 143 (1970).

> "Studies have shown an appalling resistance to hiring ex-offenders . . . thus frustrating other efforts at correction. . . . When such a releasee is thus denied the means of making an honest living, every sentence becomes a life sentence." Former Attorney General John Mitchell (Proceedings of the National Conference on Corrections, 1971). *J. W. Hunt et al., Laws Licenses and the Offender's Right to Work* (pre-preface) (1973).

Civil disabilities resulting from criminal convictions are an outgrowth of the common law attainder. In England from 1066 to 1870 the process existed, imposing forfeiture, corruption of blood and loss of all civil rights on persons convicted. Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 Vand. L. Rev. 929, 942-43, 949-50 (1970).

Forfeiture and corruption of blood were of course abolished in this country by art. III § 3 of the Constitution.[4] The practice of imposing civil disabilities, whether by statute, custom, or administrative fiat, is

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[3] *DeVeau v. Braisted*, 363 U.S. 144 (1960). There "gangrenous," *id.* at 158, corruption on the New York waterfront traced directly to convicted felons allowed a prohibition against their holding office. The holding, though, was based on a careful and complete legislative finding of substantial links between the presence of the offenders and the corruption. *Id.* at 159-60. Here there are no careful findings by anybody.

[4] The prohibitions against bills of attainder, *U.S. Const.* art. I § 9 cl. 3, § 10, were directed at the same practice by a somewhat different route. These clauses, too, are relevant to petitioner's position. Exclusion from the professions on account of past conduct is punishment which must be considered against the bill of attainder clauses. *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377, 379-80 (1866). See *United States v. Brown*, 381 U.S. 437, 458 (1965). The pertinent bill of attainder clause was not raised below but the due process analysis is as favorable to petitioner.

the unfortunate legacy of the draconian medievalism of attainder.

And the disability was applied to petitioner here without his even having been convicted. *North Carolina v. Alford*, 400 U.S. 25, 33 (1970) recognizes the truism that " '[r]easons other than the fact that he is guilty may induce a defendant to so plead. . . .' "

From the 1890's to the 1970's there has been a vast increase in penal and general sociological understanding,[5] in the pervasiveness of criminal sanctions, in the number and percentage of the population having collided with the criminal process, and in the pervasiveness of occupational licensing requirements. It would fly in the face of today's reality to literally apply the dictum of *Hawker v. New York*, 170 U.S. 189, 196 (1898) that "a well recognized fact of human experience" is that criminal offenders lack good moral character. Indeed such a conclusive presumption today is at odds with the constitutional necessity for "a rational connection between the facts proved and the fact presumed," *Tot v. United States*, 319 U.S. 463, 467 (1943). See *Heiner v. Donnan*, 285 U.S. 312 (1932) (changing conditions may invalidate once-reasonable assumptions).

The equal protection branch of the fifth amendment's due process guarantee is a part of the due process sought here. The right to work at one's chosen

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[5] *Cf. Brown v. Board of Education*, 347 U.S. 483 (1954).

occupation would, under such cases as *Truax v. Raich*, 239 U.S. 33, 42 (1915) and under the prevailing and desirable social ethic, appear to be a fundamental right requiring the most strict analysis of such cases as *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969). The need for some such careful analysis in this context was implicitly recognized in *Otsuka v. Hite*, 64 Cal. 2d 596, 414 P. 2d 412, 51 Cal. Rptr. 284 (1966).

Petitioner does not of course contend that indicia of past criminal activity are irrelevant to bar admission proceedings or that admission should never be denied on that account. He does vigorously contend that the Committee's bare finding that he once "pleaded guilty" is constitutionally insufficient. He contends that to rely on such a finding there must be evidence and findings sufficient to show that the plea substantially militates against his present fitness to practice law. This would include consideration of such factors as the relation of professional responsibility to the nature of the offense and quality of the applicant's participation, the lapse of time since the offense, rehabilitative efforts, the applicant's life since the offense, and his standing and activities in the community.[6] *J. W. Hunt et al., Laws Licenses and the Offender's Right to Work* 7 (1973).

Without such individualized consideration *Schware's* requirement of a "rational connection with the applicant's fitness or capacity to practice law," 353 U.S. at

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[6] For all that appears in the record, the Committee gave no weight to any of these factors, particularly the lapse of time and the lengthy and detailed evidence of petitioner's present activities and character.

239, is not met. And:

> Even a determination that a conviction demonstrates unfitness for a particular occupation should not complete the inquiry. It remains to ask how long the presumption of unfitness . . . is unrebuttable. At some point, evidence of general rehabilitation and satisfactory employment in unregulated occupations, parole and probation records, certificates of good conduct, expungment, and pardon, all become relevent to the question of fitness. This is the view adapted by the draftsmen of the Study Draft of the New Federal Criminal Code. . . . [T]he Draft provides for automatic removal of the disqualification five years after the defendant has completed his sentence. Implicit in this approach is the recognition that failure to give consideration to a convicted criminal's record of rehabilitation is both arbitrary and unreasonable. Special Project, *supra*, 23 Vand. L. Rev. at 1166 (footnotes omitted).

As Mr. Justice Jackson, writing for the Court in *Michelson v. United States*, 335 U.S. 469, 482 (1948) said:

> A conviction . . . may be accepted as a misfortune or an injustice, and even enhance the standing of one who mends his ways and lives it down.

Respectfully submitted,

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District Of Columbia Court Of Appeals

A-3-74

IN THE MATTER OF ROBERT J. HELLER

FOR ADMISSION TO THE BAR OF THIS COURT

Application for Review of Decision of
Committee on Admissions

(Argued January 23, 1975 Decided February 26, 1975)

Robert J. Heller, pro se.

William C. Gardner for respondent.

Before Kelly and Gallagher, Associate Judges, and Pair, Associate Judge, Retired.

PER CURIAM: On May 3, 1972 appellant filed an application for admission to the Bar in this jurisdiction and later passed the Bar Examination here. After a certain amount of correspondence entailing the submission by him of records and documents, he was notified by the Committee on Admissions of this Court that the Committee was unwilling to certify his admission.[1] Appellant demanded a hearing before the Committee, according to his right under our Rules (Rule 46 I.(f)(1)). A hearing was later conducted at which he was given a full opportunity to be heard. Several days later, appellant was notified of the Committee's decision that

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[1] Appellant had previously been denied the opportunity to take the bar examination in Florida, the state of his residence, on the ground that he was not of good moral character.

an adverse report would be entered unless appellant should exercise his right to withdraw his application, this being a procedure accorded to him under our Rules (Rule 46 I.(f)(1)). Appellant elected not to do so and, upon receipt of the Committee's findings and conclusions, this court on May 16, 1974 entered an Order to Show Cause why his application should not be denied, following which appellant and the Committee filed briefs. Oral argument was held before the court, appellant appearing pro se.

Appellant makes two principal arguments. He contends that the standard of good moral character and general fitness to practice law is unconstitutionally vague; and he variously attacks the Committee's findings as not supporting the conclusion drawn from them and as not being in accord with the evidence and law.

It is true that the term "good moral character" is a term of broad dimensions and, as has often been said, can be defined in many ways. *E.g., Konigsberg v. State Bar of California*, 353 U.S. 252, 262-3 (1957). But one would be hard put to enunciate a better standard for admission to the Bar. "With us too [as with England] the requisite 'moral character' has been the historic unquestioned prerequisite of fitness. * * * No doubt satisfaction of the requirement of moral character involves an exercise of delicate judgment on the part of those who reach a conclusion, having heard and seen the applicant for admission, a judgment of which it may be said as it was of 'many honest and sensible judgments' in a different context that it expresses 'an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions,—impressions which may lie beneath conciousness without losing their

worth.'" *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U.S. 232, 248 (1957) (Frankfurter, J., concurring).

So, it would appear that appellant must meet the historic standard of "good moral character"—there being no better test for the purpose known to us; and the Committee on Admissions, and upon occasion this court, must apply the standard judiciously.

After the hearing, the Committee found that (a) appellant "knowingly pleaded guilty to the crime of receiving stolen goods" and (b) "does not honor commitments and obligations."

The Committee concluded that appellant had failed to carry his burden of demonstrating he is qualified for admission to the Bar of this jurisdiction (Rule 46 I. (e)). That Rule requires an applicant to demonstrate by a preponderance of the evidence that he is qualified and fit to practice law. Our review of the record shows the Committee's findings are supported.

The Committee's conclusion that the application should be denied is affirmed, and it is

Ordered that appellant's application be denied.

District of Columbia Court of Appeals
Committee on Admissions
400 F Street, Northwest
Washington, D. C. 20001

May 3, 1974

FINDINGS OF FACT AND CONCLUSIONS
WITH RESPECT TO THE APPLICATION OF
ROBERT J. HELLER

1) Robert J. Heller, hereafter referred to as "Heller", passed the Bar Exam of the District of Columbia in July, 1972.

2) By reason of former Rule 16, Rules of the Committee on Admissions, the Committee was unwilling to certify Heller's admission to the Court. Heller elected to pursue the course of a formal hearing, which hearing was held on Saturday, the 15th day of December, 1973. The hearing commenced at 9:00 A.M. and concluded at 6:00 P.M.

3) A quorum was present and the proceedings were stenographically reported.

4) Heller testified and filed affidavits which are now part of the record.

5) The Committee having heard the testimony and having examined the exhibits makes the following conclusions:

a) The relevent [*sic*] testimony substantially supports the conclusion that the application should be denied.

b) The testimony of Heller failed to support his

contention that he is morally fit for admission to the Bar of the District of Columbia.

c) A careful examination having been made into Heller's moral character and general fitness to practice law, it is concluded that the Committee is unable to render a favorable report with respect to Heller.

6) The Committee makes the following findings of fact in support of its conclusions set forth above:

a) Heller knowingly pleaded guilty to the crime of receiving stolen goods.

b) Heller does not honor commitments and obligations. As an illustration, he has pending claims against him which are unsatisfied without sufficient explanation.

Therefore, the Committee concludes that Heller is not certifiable for admission to practice law in the District of Columbia.

/s/
JACOB A. STEIN
Chairman